# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

WISMARQ VALENCIA, LLC,

and

Case 6-CA-37082

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC.

David L. Shepley, Esq. (Region 6, NLRB) for the General Counsel

Ronald J. Andrykovitch, Esq. (Cohen & Grigsby, PC) of Pittsburgh, Pennsylvania, for the Respondent

David R. Jury, Esq. (United Steel Workers International Union) of Pittsburgh, Pennsylvania, for the Charging Party

# **DECISION**

#### Introduction

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves a successor employer that acquired a coil coating facility in Valencia, Pennsylvania. Although reserving the right to set the initial terms and conditions of employment, from the outset the new employer expected to hire all or virtually all of the 23 union-represented employees at the facility and to recognize the union that had long-represented facility employees. Shortly before the acquisition, the employer's CEO, and his wife, the employer's president, interviewed the employees, each of whom had been required to reapply with the new employer. At the interviews, the applicants were encouraged to speak freely about their personal lives and about their feelings regarding work, terms and conditions of employment, management, and in some cases, the union. After the interviews, the employer hired 20 of the 23, declining to hire three longtime employees. The three were the facility's union chair, an employee described by the employer's president as "very pro-union," and an employee who responded to questioning about the union by telling the employer that he believed a union was needed at the facility because of problems with upper management.

The government, along with the union, alleges that the decision not to hire the three violated the National Labor Relations Act (Act), as it was unlawfully infected with antiunion animus and based on the employer's concerns that the hiring of these three employees would result in a union that caused more "trouble" or "conflict" than the type of union desired by the new employer. The employer rejects this characterization of its motives, contending that comments by and personality traits of the three gleaned at the interviews led it to act on its right to determine that it did not want these three individuals as part of its workforce.

Finally, although the employer recognized and met to bargain with the union after acquiring the facility, the government alleges that a delay in furnishing certain information requested by the union was violative of the Act. The employer suggests the union already had the information in question, and asserts that the delay in providing the information was shortlived, did not prejudice the Union or impact bargaining, and, at most, was de minimus, and should not be found to be a violation.

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As discussed herein, I find that the new employer violated the Act as alleged when it failed to hire the three employees. I further find that the delay in providing the requested information was violative of the Act.

20 Statement of the Case

On August 31, 2010, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC (Union) filed an unfair labor practice charge, amended September 2, 2010, and amended a second time on November 23, 2010, against Wismarq Valencia, LLC (Wismarq or Employer), docketed by Region 6 of the National Labor Relations Board (Board) as Case 6–CA–37082.

On November 30, 2010, based on an investigation into the charge filed by the Union, the Regional Director for Region 6 issued a complaint and notice of hearing against Wismarq alleging violations of the Act in Case 6–CA–37082. The complaint alleged that on or about August 1, 2010, Wismarq unlawfully refused to hire applicants Dennis Stewart, George Erkens, and Ronald Criley, in violation of Section 8(a)(1) and (3) of the Act. The complaint further alleged that from August 2 to October 4, 2010, Wismarq unlawfully refused to provide the Union with addresses of bargaining unit employees, as requested by the Union, in violation of Section 8(a)(1) and (5) of the Act. The Respondent filed a timely answer denying all violations.<sup>1</sup>

A trial in this case was conducted February 1–2, 2011, in Pittsburgh, Pennsylvania.

Counsel for the General Counsel, the Charging Party, and the Respondent, filed excellent briefs in support of their positions by March 9, 2011. On the entire record, I make the following findings, conclusions of law, and recommendations.<sup>2</sup>

<sup>&</sup>lt;sup>1</sup>Consistent with pretrial notice provided to all parties, counsel for the General Counsel moved at trial to amend the complaint with regard to the alleged supervisors and agents of Respondent. The motion was unopposed and granted.

<sup>&</sup>lt;sup>2</sup>Throughout the transcript, George Erkens' name is spelled as "Erkins." However, the complaint, and most convincingly, Erken's self-completed application for employment, use the spelling "Erkens." On my own motion, all references in the transcript to "Erkins" are corrected to "Erkens." In addition, on my own motion I amend the transcript to correct the following error: on page 124, line 14, the word "foreign" is changed to "abhorrent."

#### JURISDICTION

The complaint alleges, the Respondent admits, and I find that it is a corporation with an office and place of business in Oconomowoc, Wisconsin, and that at all material times it has been engaged in the business of coating of coils at its Valencia, Pennsylvania facility. The complaint further alleges, the Respondent admits, and I find that based on a projection of its operations since about August 1, 2010, at which time the Respondent commenced its operations at the Valencia facility, the Respondent, in conducting its business operations will annually purchase and receive at its Valencia facility goods and materials valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania. The complaint alleges, the Respondent admits, and I find that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization with in the meaning of Section 2(5) of the Act.

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Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

#### **UNFAIR LABOR PRACTICES**

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I proceed in two parts. In part I, I consider the General Counsel's allegations that Wismarg unlawfully and discriminatorily failed to hire applicants Dennis Stewart, George Erkens, and Ronald Criley. In part II, I consider the General Counsel's contention that Wismarq unlawfully delayed furnishing the Union requested information.

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#### Part I

## A. Background

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Wismarq is in the business of coating and slitting steel and aluminum coil. Its original facility, purchased in 1982, is located in Oconomowoc, Wisconsin, and employs approximately 55. In the mid-1990s, Wismarq acquired a second facility in Franklin Park, Illinois, that employs approximately 45. Currently, neither facility is unionized.

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Wismarg acquired its Valencia, Pennsylvania facility—the facility at issue in this case— August 1, 2010. The first day of operation under Wismarg was August 2.

After July 2010, Wismarg acquired a fourth facility, a shutdown operation located in Jackson, Tennessee, that Wismarg hopes will be operational by mid-2011.

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The CEO of Wismarq (for approximately 20 years) is Charles Terrizzi. Jan Terrizzi is Wismarg's president. The Terrizzis are husband and wife.

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The predecessor owner and operator of the Valencia facility was NAPCO, whose parent company was Ply Gem.<sup>3</sup> For many years, the Union has represented the production and maintenance employees at the facility. Until mid-2009, the Valencia facility employed approximately 130-140 bargaining employees. In 2009, Ply Gem bought a "more modern" plant

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<sup>3</sup>At the hearing, witnesses sometimes referred to the previous owner of the facility as Ply Gem and sometimes as NAPCO. For our purposes those entities are interchangeable. They are the predecessor employer to Wismarg at the Valencia facility.

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in Ohio, and closed much of the NAPCO production lines, leaving the coil painting lines as the primary work. By the time of the sale to Wismarq, there were 23 bargaining unit employees working at the facility. The downsizing was accompanied by an agreement reached between the Union and NAPCO to increase cross-training and the number of jobs performed by each employee in exchange for pay enhancements.

As of July 2010, the plant manager of the Valencia facility was Joe Ferrese.

As of July 2010, two members of the NAPCO bargaining unit held union positions. Dennis Stewart, known as "Pudge," was the unit chair, the top union position at the facility. Mike Donop was the griever. Generally, the unit chair has final say over the griever in matters that the Union puts before the Employer.

During his "due diligence," Charles Terrizzi had been told by a Ply Gem manager that "its been fine, its been great," dealing with Pudge. Ply Gem told Charles Terrizzi that "there was a really good relationship between the Union and management."

Stewart was also the treasurer of Union Local 6346, an amalgamated local to which the NAPCO union members belonged. Stewart had been involved in the last four to five collective-bargaining agreements negotiated between the Union and Ply Gem. In 2006, Stewart had helped negotiate the final collective-bargaining agreement that remained in effect at the plant as of July 2010. He became the unit chair in 2007. As unit chair, Stewart described his duties as "mediat[ing] any problems between employees and company, the management. If the employees had any complaint they would come to me, which I would go to [management] and work out the problem." Stewart was also involved in the agreement between the Union and NAPCO, as part of the downsizing, to require employee cross-training on jobs in exchange for increased pay for increased job skills.

All employee grievances had to go through Stewart, which enabled him "to make sure there was a grievance and not just a complaint." While, by all accounts, Stewart, and the Union's relationship with NAPCO was positive, this did not mean Stewart always agreed with management or management with him. After becoming the unit chair in 2007, three or four grievances made it to step 3 of the grievance procedure without being resolved, which meant, at that step, that Stewart dealt with Plant Manager Ferrese as his counterpart. They had disagreements over labor matters in the course of resolving these grievances. However, none of the cases needed to be processed to arbitration and there were no work stoppages. Stewart testified that particularly in the last couple of years the Union was trying to work well with Ply Gem to make the downsizing transition go smoothly.

# B. Wismarg's Purchase of NAPCO and the Hiring of NAPCO Employees

In purchasing the Valencia facility, one of the things that was attractive to Wismarq about the facility was the fact that there was an experienced workforce. Indeed, Charles Terrizzi testified that his plan for operating the facility involved the expectation that Wismarq would hire all of the NAPCO employees.

Terrizzi also anticipated that there would be a union at the facility: "we knew what the law was and we didn't have a problem with it." As part of Wismarq's due diligence, it had been reported to Terrizzi by Ply Gem that there was a good relationship between the Union and the employer. "So we anticipated, A that we would have a union, and B, that we would hire all or virtually all of the employees."

The reports of the positive union-management relationship at Valencia were important to Terrizzi in determining to purchase the facility. Terrizzi testified that when Wismarq had purchased the Oconomowoc, Wisconsin facility (the original Wismarq facility), he attempted to negotiate a contract with the union representing the employees but he felt that the union's demands were "outrageous." No agreement was reached and the employees decertified the union. The union returned a couple of years later and won recognition in an election, but once again the Terrizzis and the union failed to reach an agreement and "this is where the bad taste came in our mouth." Terrizzi testified that the union at Oconomowoc "had attempted to coerce people into signing cards."

And when we tried to meet with the Union, we were basically told that the people that we valued as employees, that we know as individuals, were slaves that worked for the Union. And that they would do anything that this particular [union representative] told them to do, and that they were just puppets and they were his puppets and his work force.

We valued the employees. We felt that that was not good representation for those people. We knew what their complaints were. We were out on the floor with them. If they chose to have a union, that was fine. But then the union ought to be representing them.

The conflict we saw was more between the Union and the employees than between us and the Union.

And as a result of that, what I'll call chaos during that period, they were decertified again, petition from the employees, which we had no part of.

Because of this experience, we have been very careful in looking at situations where there may be labor conflict for whatever reason. And that's where we got the bad taste.

Referencing the union situation at Oconomowoc. Terrizzi explained, "[w]e did not want to get into a similar circumstance." As discussed below, during an interview with one of the discriminatees, one of the Terrizzis stated, "our other two plants aren't union and we understand that there is a union in place here. And we don't have any problems with the union as long as there is no trouble or conflict." In an interview with union griever Donop, Charles Terrizzi explained that "[h]e liked the fact that the Union had no issues either NAPCO or Ply Gem" and "that if there [were] issues with it, he wouldn't have even bought the place." Terrizzi testified that "quite honestly, we didn't want to consider buying a company that had trouble, whether it was between the Union and its members or between the Union and management."

In addition to past problems with the union at Oconomowoc, the Terrizzis experienced problems with some of the employees at the Franklin Park facility that influenced their actions at Valencia. According to Charles Terrizzi, he and his wife decided to interview all of the Valencia employees before hiring them because a past experience at the Franklin Park facility taught them that if they did not they could end up with some "bad apples." Terrizzi testified that he hoped that with the interviews "we could spot any potential problems and make sure didn't have that kind of issue."

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In conducting the interviews for the Valencia facility, the Terrizzis had been told that "everybody was qualified in the jobs that they were doing, so we really weren't looking to try to somehow test them on their knowledge of jobs or which jobs they could or couldn't do." The Terrizzis "assumed . . . that they were qualified or they wouldn't have been there."

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Charles Terrizzi testified that "[w]hat we were looking for was a cohesive work force. We wanted people of good character. We wanted people who were willing to be flexible, who were cooperative and would fit in with work as team players and not cause friction."

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Charles Terrizzi also identified "another purpose for the interviews" which was "to discover underlying concerns and issues of the employees." Terrizzi explained that

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[w]e had been limited in our due diligence. As a consequence, we value the opinions of people that work at whatever level in the company. So we thought we might learn something from them about how business was conducted at the company, whether there were underlying concerns or issues, and we got all that and more.

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The interviews were held in a first floor NAPCO office at the facility and were conducted by Charles and Jan Terrizzi in late July.<sup>4</sup> Jan Terrizzi took notes, but also participated in the interview. The interviews lasted 30–45 minutes, and some lasted longer. Charles Terrizzi explained: "As long as people wanted to continue to talk, we let them."

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After all of the interviews, the Terrizzis met, together with Joe Ferrese—the NAPCO plant manager the Terrizzis would also hire to be plant manager—and went through and made a decision on each of the employees. According to Charles Terrizzi, "we really didn't discuss these interviews . . . . [u]ntil we sat down with Mr. Ferrese and Mrs. Terrizzi had her notes. I had my recollection."

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## C. The Interviews of the Alleged Discriminatees

#### 1. The Stewart interview

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Union chair Dennis Stewart had worked at the Valencia facility from March 1974 until July 31, 2010. Like all the other employees, Stewart filled out an application to be hired at Wismarq. As with every other employee, he was interviewed by the Terrizzis.

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Stewart estimated that the interview lasted 30–45 minutes. Jan Terrizzi took notes, and the conversation between the Terrizzis and Stewart was informal and went back and forth. (The record suggests that this was typical for all the interviews.)

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Stewart and the Terrizzis introduced themselves, and they asked him to tell them something about himself. He told them his history at NAPCO, his family life, about recently celebrating his 25th anniversary, and about an injury that occurred to his brother. About five minutes into the interview Stewart identified himself to the Terrizzis as the union chair, and told them that he was "Pudge," something Stewart assumed they already knew. According to Charles Terrizzi, "[t]hat cleared up who the Pudge was."

<sup>&</sup>lt;sup>4</sup>Jan Terrizzi was absent for one interview, which Charles Terrizzi conducted alone. That was the interview of union griever Michael Donop.

Charles Terrizzi testified that the interview with Stewart "was very wide ranging." In the interview they "talked about all kinds of things" with Stewart. "He asked a lot of questions. He talked about seniority." Stewart asked how seniority would work at the facility "because we were informed that we were all being discharged on the 31st and being rehired on the 1st. So if we're all rehired on the same day, I wanted to know how seniority is going to work." He and Jan Terrizzi discussed what seniority meant to each of them. Asked at trial if this concern related to his position as unit chair, Stewart testified, "[w]ell sure, my job, you got to ask those questions."

The Terrizzis told Stewart that seniority was a matter for negotiations. As Charles Terrizzi explained, "[w]e tried as best we could to explain how we intended to operate." "A couple of times he [Stewart] said those are points [for] negotiation, which of course they were. But we told him where we expected to start with the terms and conditions, not all of which had been completely formulated."

Stewart asked about how vacations were going to be handled "if we were getting paid . . . by Ply Gem for our vacation. And Jan had said . . . if you have a vacation scheduled, you can still take it. But Wismarq wasn't going to pay for it since Ply Gem was already reimbursing everybody for their vacation for that year." Stewart asked "why can't we get full seniority rights on vacations for all of the NAPCO time." The Terrizzis (or one of them) responded that "this is the policy at the beginning. If there is going to be a change to that, [it] has to be negotiated."

Stewart asked the Terrizzis about "the following year, because we're already at the end of July and the contract called for if you worked [1040] hours you would be entitled to your full vacation for that year unless you were terminated earlier, then it would be prorated." Jan Terrizzi said "that was the first she heard of that and that she was going to have to check into it."

They talked about the health care plan the Terrizzis were looking to adopt, and Stewart explained the health care currently available to employees under NAPCO. Stewart testified that the employees "had gotten a memo from [the NAPCO HR manager] saying that there shouldn't be any lapse in our insurance coverage, that Wismarq was still looking to find a carrier for us." Stewart testified that the Terrizzis confirmed that they were "still working on making sure that we had no lapse in our insurance whenever they took over the company." Terrizzi stated that his other plants have a 75/25 plan. Stewart understood that Terrizzi meant that the Employer paid 75 percent of the co-pay and the employee 25 percent, but at the hearing Terrizzi indicated he was referring to a 75/25 split on premium costs. Stewart responded in the interview that the plan at NAPCO was an 80/20 plan (by which he was indicating the split on co-pays), and Stewart said, "I guess that's something we will have to negotiate." Stewart offered to have the Terrizzis look at a health insurance plan sponsored by the Union as a possible plan to adopt. Charles Terrizzi agreed: "He offered to get that information to us. And we said fine."

The Terrizzis and Stewart talked about the Union and NAPCO's negotiation of provisions requiring employees to perform multiple tasks as part of the downsizing that had occurred in the last couple of years. This was something Stewart was very familiar with, having been part of the union leadership (along with International Union staff representative) to agree to it. Charles Terrizzi testified that Stewart raised the multi-job issue, "argued" about it, and "more than once" indicated that it was a matter for negotiations. The Terrizzis told Stewart that "we thought that was a wonderful provision. We were surprised that the Union had agreed to that kind of position. . . . [W]e were pleasantly surprised that that was in effect at the NAPCO plant." And the Terrizzis confirmed to Stewart that "you know, we think that that's necessary for this to be an effective, profitable operation."

Stewart was asked about he positions he had held at the plant and he described them for the Terrizzis, indicating he had worked in the material handler, shipping, receiving, "which was a combin[ation] of two jobs during the shutdown . . . and that I had been half-assed trained on the slitter, excuse my French." He told the Terrizzis that he had "just worked a whole week on the slitter by myself. It was rough, but I got through it." Stewart testified that he was referring to the view, shared by some employees, that "the slitter is a pretty dangerous piece of equipment and if you don't know what you're doing, it's easy to get injured on the job."

The Terrizzis "said they wanted flexibility" among the workforce. Stewart testified that he would "rather stay where I was . . . as a material handler since I was an expert[] on that job. I had been doing that job, and if they needed flexibility, they could always use me to fill in as a line driver." Stewart referenced the fact that part of the "idea" or arrangement between the Union and NAPCO about employees learning more than one job "is that they would pay you a higher rate of pay," but Stewart told the Terrizzis that he "didn't care to have the extra rate of pay." Stewart "made the statement that Joe Ferrese has his flexibility with people on the paint line knowing three jobs and that I can go over an drive forklift and they move people around to keep the production or the system flowing. That, in fact, later that night I was staying got work a couple of hours overtime for a guy that wanted to leave early to go on vacation."

According to Charles Terrizzi, in testimony sharply disputed by Stewart, Stewart declared that "nobody's going to tell me that I have to do more than one job or what job that's going to be." Jan Terrizzi did not testify as to a specific statement by Stewart to that effect, but asserted that Stewart "didn't want to do anything other than what he was doing." Stewart denied making any such statement: "I never made that statement". . . . I'm absolutely positive." According to Stewart, "No, I never made that kind of statement. I would never make that kind of statement. Like everybody was there to get a job. I went in with an attitude to get my job. I've been there for 36 years. I wanted to stay there. I would never [have] made that kind of statement." There is nothing in Jan Terrizzi's notes of her interview with Stewart to corroborate the claim that he made such a statement.

Charles Terrizzi testified that Stewart told the Terrizzis that the requirement to handle multiple tasks in the plant was "B.S." Jan Terrizzi did not recall this statement, or Stewart using the word "B.S." It is not in her notes of the interview. Stewart maintained he did not say it ("I never said that. . . . I'm absolutely positive.").

According to Charles Terrizzi, "we were looking for somebody to be cooperative, that was going to be flexible," so he said he was concerned about Stewart's comments. Although he did not mention it in his direct examination, when cross-examined, Terrizzi referenced "the certain amount of anger [Stewart] showed during the course of the discussion." In this regard, Terrizzi mentioned, for the first time on cross-examination, that Stewart "expressed anger at some of his fellow employees" for not working hard enough or being slackers (although Terrizzi said that Stewart did not actually use that word).<sup>5</sup> As an example, Terrizzi claimed that Stewart complained that "with regard to driving the fork lift that he was better than [other employees] and that they had no business taking his job." According to Terrizzi, "[j]ust a number of times [Stewart] was denigrating to his fellow employees as not being up to his expectations I'll say."

<sup>&</sup>lt;sup>5</sup>Terrizzi stated that if employees were "slackers" or "lazy" on the job it would "upset" him, but not make him "angry," as he claimed it made Stewart.

Stewart denied saying anything to the effect that his fellow employees were either "lazy" or "slackers": "No, I never made that kind of statement. I would not talk about my Union brothers in that ma[nn]er." Stewart said that he did, in "talking about my position as a unit chair," state that "being the chairperson puts you right in the middle. I mean you got both sides that can be mad at you at one time. Me not filing grievances they think they have a grievance, and I have to tell them, no, you don't' have a grievance. And then when I do file a grievance, I have the company telling me, well, what are you filing that for."

Stewart and Charles Terrizzi talked briefly about football. Stewart described the tone of the interview and "calm and low key" and he "thought it went well." He was in a hurry to leave because "I had a truck driver waiting for me up in the shipping department that I had already started loading. And I don't want to hold up the trucks too much."

## 2. The Erkens Interview

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George Erkens worked for NAPCO from November 1986 until July 31, 2010. As of July 2010, Erkens worked as decoiler setting up coils, getting metal ready to be painted, and setting up rolls and grinding them for the application of paint. Erkens was also qualified in the lab, and in quality control. He was not qualified in waste treatment. Erkens was a union-represented employee and a union member. He did not hold a union office during his years at the facility.

Erkens, like the other NAPCO employees, completed an application to work at Wismarq and was called to an interview at the end of July, which was conducted by the Terrizzis in the front office at the Valencia plant. The interview lasted approximately 30 to 40 minutes.

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Jan Terrizzi took notes during the meeting and there was back and forth conversation between the Terrizzis and Erkens.

Erkens recalled that the interview began with small talk, questions about his family and his hobbies. Erkens was asked by the Terrizzis what he thought about Ply Gem. He told them it was a good place to work and that he had no concerns about working there. As a joke, he mentioned that it would be nice if there was air conditioning in the plant, because it was very hot at that time. Jan Terrizzi recalled that this was funny and they all laughed.

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Erkens made a suggestion that the Terrizzis look at the system used to schedule orders because a lot of times the employees would get out the materials they needed based on the scheduled work "and then at the last minute there would probably be no metal or no paint or whatever" and the employees would have to do "unnecessary work" to set up and prepare the extra materials.

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At the interview, Erkens mentioned a "grandfather clause" in the NAPCO terms and conditions, negotiated between the Union and NAPCO, that permitted some people doing the same job as Erkens to earn a significant wage differential.<sup>6</sup>

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Charles Terrizzi testified that Erkens said "I don't think I should have to work more than 8 hours," and Terrizzi added that he thought it "irritated" Erkens to be told to work more than 8 hours a day. Erkens denied that he had said this. Erkens testified that he did not remember

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<sup>6</sup>Charles Terrizzi testified that "we listened to what the employees said." For instance, consistent with Erkens' complaint, upon commencement of operations Wismarq did away with the wage differentials, "We felt everybody ought to be paid the same thing for the same job."

making any comment about hours worked, but he might have said that he would "prefer to work 8 hours instead of 10 . . . [b]ecause we were working a lot of hours at the time. And getting out of couple hours early might be nice." Jan Terrizzi's notes state: "would prefer 8 hrs. vs. 10 hrs."

Erkens also talked about the crew he worked with and how everyone helped each other out with the work. Erkens was qualified to perform all but a couple of jobs in the plant. Erkens also said that there were some employees that might take advantage of how much employees worked together to help each other out and would rely on others. But Erkens also told the Terrizzis that there "was a lot of experience" at the facility and "that everybody worked well together. That was a good thing."

Erkens asked the Terrizzis how they felt about a union. In response, the Terrizzis (Erkens was not sure which one) told him,

our other two plants aren't union and we understand that there is a union in place here. And we don't have any problems with the Union as long as there is no trouble or conflict.<sup>7</sup>

The Terrizzis then asked Erkens what he thought about the Union. Erkens responded,

I can take it or leave it. But at this point that I believed we should probably have a union in here because some people in management, not mentioning any names, that were hard to talk to or discuss things with, that they had their own point of view and they weren't willing to listen.<sup>8</sup>

Erkens described the tone of the interview as "[c]alm. Easy going, nonchalant. I thought it went fine." He testified that "I try to show respect. I didn't raise my voice. I might have had some constructive criticism. But I was polite, courteous." He left believing he was going to receive a job offer.

Charles Terrizzi recalled from his interview with Erkens that Erkens "was a very soft spoken guy, very measured in general in what he said. Very polite." However, after telling the Terrizzis that "we have a great team and we work together," Terrizzi claimed that Erkens "got agitated about people who weren't pulling their own weight." Terrizzi claimed to have detected

<sup>7</sup>Charles Terrizzi corroborated that Erkens raised the issue of the Union. He did not recall Erkens asking him what he thought of the Union, but did not deny it. Indeed, Terrizzi testified that Erkens "may very well have" asked Terrizzi what he thought of the Union. Terrizzi did not deny the statement attributed to him about the Union. I credit Erkens undisputed account.

<sup>8</sup>Erkens recalled this latter statement only after his memory was refreshed with his pretrial affidavit. However, I credit his testimony. The statement was, essentially, corroborated by Jan Terrizzi. It is in her notes. Moreover, she testified that Erkens said that he "doesn't feel upper management listens" and that "his statement" was that "that's why there's a Union." The statement was also corroborated by Charles Terrizzi. He testified that Erkens "said that, to the best of my recollection, he said that there was a union there and it was likely related to disagreement, or difficulties with management. I'm paraphrasing. But that is the gist of what he said." Charles Terrizzi did not confirm or deny asking Erkens what he thought about the Union. Jan Terrizzi said that she "didn't ask" Erkens why there was a union. I credit Erkens' clear and cogent testimony on this issue, including that he was asked in the interview what he thought of the Union.

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that Erkens had "underlying" anger, and thought there was "an edge" to Erkens' comment about not wanting to work more than 8 hours a day.

# 3. The Criley interview

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Ronald Criley worked at the Valencia facility from June 1985 until the end of July 2010. While at Ply Gem he worked a variety of jobs throughout the operation. He was qualified to perform all the work at the facility except the lab work. Criley was a union member and previously served as the union griever at the facility. He also was a member of the safety committee in 2009 and early 2010.

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Criley applied to Wismarq and was interviewed by the Terrizzis in the second or third week of July. The interview lasted 30 to 35 minutes. Jan Terrizzi took notes during the meeting and there was discussion back and forth between Criley and the Terrizzis during the interview.

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The interview began with them introducing themselves to one another. The Terrizzis wanted to know about Criley's previous employment, and on which positions he was qualified to work. They asked Criley about his hobbies and what he liked to do in his private time. They told Criley about their grandchildren and Criley discussed his family.

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During the interview Criley told the Terrizzis that he was certified in CPR and in AED. Criley donates blood regularly and made the suggestion that the Terrizzis conduct a blood drive at the plant. Jan Terrizzi said that was a good idea and wrote it down in her notes.

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Criley told the Terrizzis that he used to work on the plant's safety committee in 2009 and 2010, but had quit his position because he (and some of the other bargaining unit employees on the committee) did not get along with Feresee. He told the Terrizzis that he left the committee because he "just couldn't work with [Ferrese]."9

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Criley told them he was glad to be back to work, as he had been out for six weeks after having an operation. Criley told the Terrizzis that the \$2500 deductible on the health insurance maintained by NAPCO was too high, and that he was only receiving \$130 a week in sick and accident pay.

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During the interview Criley asked the Terrizzis if they were going to update the slitter and the forklift. Criley expressed the view that the slitter was not safe and that the forklifts were older and falling part. Charles Terrizzi replied that "we're not coming in here with bags of money."

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The Terrizzis asked Criley if there was anyone in management he could change, who would it be. Criley replied that "I didn't want to talk about that, because I'd probably lose my job." At one point Criley related a story, from years past, where a supervisor at the facility had denied him leave, which delayed him from being with his ill mother when she died.

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<sup>10</sup>This latter comment is reflected in Jan Terrizzi's notes of the interview with Criley, although she was unable to state why the comment was in her notes or who said it. I credit Criley's undisputed account, which is as reflected in the text.

<sup>&</sup>lt;sup>9</sup>Criley denied Terrizzi's claim that he said "I want nothing to do with" Ferrese.

Charles Terrizzi testified that while Criley was "an interesting guy" and the [i]nterview went well." According to Terrizzi, "[t]he tipping point for me, which is what stands out, was his anger, continued anger" over events that had happened in the past. "[l]t was like he could never let go of anything." According to Terrizzi, Criley "wasn't willing... to get beyond that, to look beyond the fact that there was a new company coming in and things could change if he was having some difficulties." Terrizzi asserted, with regard to a number of Criley's complaints, the problem was that he would "grind on" about the problems (e.g., the inability to get along with Ferrese, the incident involving his mother, the problem with the forklifts, the slitter) allegedly raising them repeatedly in the interview "when we should be moving on to the next topic." Terrizzi claimed that he and Jan Terrizzi asked him to move on but he would repeatedly return to these topics. According to Terrizzi, this indicated to him that Criley was "disruptive by continuing to bring up the same thing over and over again."

At the hearing, Criley squarely denied raising any of these issues in the interview more than once. He agreed that each item was discussed, but only once. He did not return to them. There is no indication in Jan Terrizzi's notes that Criley repeated complaints or that the Terrizzis had to ask him to move on to other topics.

Although she could not recall it at trial, Jan Terrizzi stated in her pretrial affidavit that Criley seemed "very pro-union." <sup>11</sup>

Criley thought the interview went well. When he left, the Terrizzis shook his hand and told him "we'll be talking to you later."

# D. The Hiring

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According to the testimony of the Terrizzis, the hiring decisions were made after all the interviews. The Terrizzis met with Ferrese, whom they had not yet hired but with whom they had had more contact with than other NAPCO supervisors or employees, and went through the list of employees, and decided there and then on each employee. Charles Terrizzi explained: "We really didn't discuss these interviews because there wasn't much time. Until we sat down with Mr. Ferrese and Mrs. Terrizzi had her notes. I had my recollections. We went over these, a decision was basically made at that point."

According to Charles Terrizzi, he and his wife relied on Ferrese's input only once, with regard to the decision to hire union griever Donop. The Terrizzis had decided not to hire Donop, because (as with Stewart, Erkens, and Criley) Charles Terrizzi "sensed" that Donop had "some underlying anger issues." However, after Ferrese intervened and spoke in his favor, opining that "if it was up to me, I would keep him," the Terrizzis decided to hire him. In all other instances, the Terrizzis made the decision and Ferrese offered no dissent, or objection to their hiring inclination, and perhaps, weighed in with agreement.

All NAPCO unit employees were hired with the exception of the alleged discriminatees in this case, Stewart, Erkens, and Criley.<sup>12</sup>

<sup>&</sup>lt;sup>11</sup>This sworn pretrial statement by Jan Terrizzi, the Respondent's president, and an admitted agent, is an admission pursuant to Fed.R.Evid. 801(d)(2).

<sup>&</sup>lt;sup>12</sup>One NAPCO supervisor was not rehired as a supervisor because he was "just not the kind of guy we wanted to be a supervisor." But the Terrizzis thought "we at least owed him an offer to move into the hourly work force" so he was offered and accepted a bargaining unit position.

Be	low, I will con	isider in more	depth the m	otivation for the	e Terrizzis'	failure to I	nire the	
three alleg	ed discrimina	atees, but the	mechanics of	of the decision,	as describ	ed by the	Terrizzis a	аt
trial, was s	straightforwar	d.						

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With regard to the decision on Stewart, Charles Terrizzi described a very limited exchange at the meeting with Jan Terrizzi and Ferrese:

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"Mr. Stewart come up, Mrs. Terrizzi says I don't want to hire him. I said I don't want to hire him.

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We said to Joe, you know, do you have any reason, our reason is that he just doesn't seem to be willing to be flexible. He said that, to us, that he's not, he doesn't think anybody ought to tell him what job to do.

And do you have a reason to disagree with that. Answer was no. We moved on [to next employee].

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Terrizzi testified that "there were probably more words than that, but that was the gist of it."

Events with regard to Criley were similar. According to Terrizzi:

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Mrs. Terrizzi and I met with Mr. Ferrese. I don't know who said it first. But either Jan, Mrs. Terrizzi or I said I'm not comfortable with this employee. You know, looked like there was some underlying, continuing anger and just couldn't let go of things and probably wasn't going to be a good—Joe Ferrese likes to use the word team player.

I think don't tend to use that term as much. We tend to talk about it in terms of their ability to get along with others.

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But basically we agreed and we asked Mr. Ferrese if he had any other insight and the answer was no. And we said so we are not going to offer him a job and moved on.

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With Erkens, a similar process was testified to by Charles Terrizzi:

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We used the same procedure. We went through the employees, Mrs. Terrizzi, myself and Mr. Ferrese. And again, I don't recall who said I don't think we ought to offer him a job.

He doesn't seem like he really wants to be cooperative with everybody, that he seems to have too many issues with other employees and he has this anger that maybe in stressful situations, we don't know, that comes out that might cause him to be disruptive.

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Mr. Ferrese offered no other insights to us.

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Offers of employment were sent to all of the bargaining unit employees except Stewart, Erkens, and Criley.

Stewart learned from Ferrese that he was not being hired on July 28. According to Stewart, Ferrese told him that "Wismarq's decided not to hire me." Stewart asked why, and Ferrese "said he didn't know." Erkens also testified that Ferrese told him he was not going to be rehired. Erkens testified that he was "shocked" and asked Ferrese why. According to Erkens, Ferrese said, "I really don't know. Its coming from Wismarq." Criley testified too, that he was told by Ferrese that he was not going to be hired by Wismarq. Criley asked why and testified that Ferrese said, "I cant' tell you."<sup>13</sup>

# E. Credibility: The Interviews

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This is a case that rests, in significant part, on credibility resolutions. Ultimately, as in many 8(a)(3) case, the employer's motive for the adverse employment action is in dispute. In this case the Employer has articulated highly subjective nondiscriminatory motives for the refusal to hire the alleged discriminatees. Accordingly, the credibility of the witnesses attesting to it is necessarily a significant consideration. I will consider the Employer's asserted motive for its hiring decisions at length below in my legal analysis of this case.

There is also a more basic factual dispute in the testimony over what occurred during the interview process. In the testimonial descriptions of the interviews—particularly of Stewart and Criley, but also Erkens to some extent—there is a sharp dispute over whether the employees made or repeated certain comments.

In many cases, these comments were referenced by the Respondent in articulating its rationale for its ultimate employment determinations, and in that sense, the determination of what was said at the interviews bears on the analysis of the Respondent's motive for its hiring decisions. But while related, findings regarding the Employer's asserted motive for its hiring and nonhiring decisions are distinct from the more basic findings of what transpired at the interviews. At this point, I confine my findings to sorting through the interviews.

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Stewart and Criley emphatically denied making certain statements or taking certain actions in the interviews attributed to them by one or both of the Terrizzis. The alleged statements or actions, it is fair to say, did not cast the employees in a very good light. With Erkens there was less pointed of a factual dispute, but still, some important ones about what he stated.

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In terms of demeanor, I found Stewart, Criley, and Erkens to be excellent witnesses. Their testimony was straightforward, free of bombast, and free of tailoring of the answer based on the identify of the questioner. They were certain about some things, less sure of their recall on others, all of which is appropriate. Overall, they each demonstrated a good and plausible recall of the events at the interview.<sup>14</sup>

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<sup>&</sup>lt;sup>13</sup>Ferrese denied telling Stewart that he didn't know why there was no offer extended to him. Ferrese testified that he told the same thing to all three: "the answer I gave each individual was based on the interview they decided not to hire you."

<sup>&</sup>lt;sup>14</sup>In a sense they had an advantage over the Terrizzis in that regard. The employees were each in one interview. The Terrizzis conducted multiple interviews in a short time. It is understandable that their recall of each interview would not be as precise. And there is the undeniable fact that the single interview was for each employee, as it turned out, a more important event in their lives than any single interview was for the Terrizzis.

While the employees adamantly denied certain statements attributed to them by the Terrizzis, they did not rush to deny every comment that might be less than helpful to their position. For instance, while denying the extreme comments attributed to him by the Terrizzis, Stewart readily described how he told the Terrizzis he would "rather stay where I was . . . as a material handler" and that he "didn't care for the extra rate of pay" that went with qualification on additional paint line jobs. In other words, although Stewart's attitude toward working different jobs was at issue, Stewart readily admitted to making comments related to that, though not in the terms stated by the Terrizzis. Criley also admitted to raising a number of issues that he clearly had reason to believe, based on Jan Terrizzi's testimony, that Jan Terrizzi held against Criley. Yet, he credibly explained what he remembered saying in each instance. Erkens too related in his testimony numerous things that (having listened to Jan Terrizzi testify earlier in the day) he knew Jan Terrizzi was claiming to have held against him in the hiring process, such as the comment about preferring to work 8 hour days and comments that some employees took advantage of the way employees all helped each other.

I found the employees' testimony plausible, internally consistent at every point, and provided in a manner that seemed believable. Clearly, they were different people, and told their stories differently. Stewart seemed somewhat incredulous, but believably so, in the accusations that the Terrizzis leveled against him. In our hearing, Erkens was, as described by all in testimony about the interview, polite soft spoken, and measured. Criley seemed the most voluble, and his emotions about not being rehired were unmistakable. But to my mind he appeared to be answering honestly and fairly.

The employees' testimony and demeanor must be contrasted to that of the Terrizzis. First of all, with regard to Jan Terrizzi, she made a point of testifying—and under questioning from her counsel added a medical dimension to it—that "I don't have a good memory." Instead, she relies on taking notes. She testified that notes are "my life. That's how I deal with my life. I take notes. I don't have a good memory. So I take notes." Jan Terrizzi repeatedly exhibited, and, indeed, pled, a poor memory. Without notes she remembered only bits and pieces of the interviews and even of her own testimony rendered only minutes before. Indeed, after testifying to a variety of reasons—drawn from the interviews—that the alleged discriminatees were not hired, she admitted that she did not have any recollection of what occurred in the interviews with these employees. Given her professed and exhibited memory limitations, it is hard to accept Jan Terrizzi's testimonial recall over that of the employees on any issue in dispute. Moreover, provided with her notes, Jan Terrizzi repeatedly provided testimony, clearly not drawn from the notes, that reflected negatively on the employees. I've never seen memory "refreshed" in such a way. Her testimony contained inconsistencies and conflicts that cannot be reconciled. Her

<sup>&</sup>lt;sup>15</sup>No party moved to sequester witnesses. Witnesses were free to (and did) sit through the testimony of the other witnesses in this case.

<sup>&</sup>lt;sup>16</sup>For instance, Jan Terrizzi testified that one of the reasons Erkens wasn't hired was because he thought that upper management didn't listen. (Tr. 69.) But then, under questioning from the Respondent's counsel, said the opposite. (Tr. 98–99.) She testified that she did not use her notes in the making the hiring decisions (Tr. 53) and then that she did. (Tr. 56.) Her pretrial affidavit states that she did not use the notes in making hiring decision. (Tr. 57.) Terrizzi testified that she did not recall Criley indicating that he was "very pro-union," but in her pretrial affidavit she stated that "Criley brought up the Union" and "Criley was very pro-union." Jan Terrizzi testified that Stewart did not state in his interview that he held the position of union chair, and that at the time of hiring she did not know who was the union representative. Both Charles Terrizzi and Stewart convincingly contradicted this.

testimony cannot be relied on when in conflict with witnesses exhibiting a surer memory.

Charles Terrizzi was a surer witness. But on cross-examination a contentiousness, rather than an effort to simply answer questions (see, e.g., Tr. 246, 250, 266, 270, 275), and a willingness to add or even change answers, emerged that I did not anticipate from his placid demeanor on direct. For example, on direct examination he testified that because of the negative experience in years past with the union at Wismarq's Oconomowoc, Wisconsin facility, "we have been very careful in looking at [potential purchase] situations where there may be labor conflict for whatever reason." However, on cross-examination he denied that when considering the Valencia purchase he was careful to consider possible labor conflicts with a union.

Another example: asked by counsel for the General Counsel if he got the impression that Stewart was speaking during the interview about issues like vacation, seniority, and health benefits in his role as union chair, Terrizzi responded, "I guess I didn't form an opinion one way or another." Asked the very same question seconds later, it was if he had time to calculate a "better" answer and quickly formed a decided opinion. This time he answered: "I assumed it was a personal thing. . . . . Because it was a personal interview. We were not in a negotiation, We were in a personal interview for a job. So my assumption was these were things that were personally important or interesting to him." They may have been, but Stewart introduced himself as the union representative and I think Terrizzi's answer was not only developed on-the-spot as an afterthought, but contrived.

On direct examination, Terrizzi explained that the refusal to hire Stewart was based on Stewart, according to Terrizzi, seeming not to be "flexible" and unwilling to perform a variety of jobs, and allegedly stating that he was going to do what he wanted to do and no one would tell him what to do. On cross-examination Terrizzi added another reason for not hiring Stewart: the claim that a he showed "a certain amount of anger . . . during the course of the discussion," a charge that he made against all of the alleged discriminatees and posited as a reason they were not hired. Notably, Ferrese did not cite anger of the alleged discriminatees as a reason the Terrizzis' gave him for not hiring Stewart, Erkens, or Criley. Nor did he cite Criley "not letting things go" or "grinding on" about complaints as a reason the Terrizzi's told him in the hiring meetings for not hiring Criley, although it figured prominently in Charles Terrizzi's explanation at trial for the decision.

Finally, in considering the competing credibility of the witnesses, I cannot overlook that not one of the disputed statements—i.e., the statements (or repetition of statements) asserted by the Terrizzis, but denied by the employees—are mentioned in the notes of the interviews taken by Jan Terrizzi. Thus, although posited as making "quite an impression," (at least on Charles Terrizzi), the notes of the interview make no reference to anything like Stewart saying "nobody's going to tell me that I have to do more than one job or what job that's going to be." There is nothing in the notes of the interview with Stewart suggesting that Stewart said anything like handling multiple tasks in the plant was "B.S." The note of the interview make no reference to Stewart saying anything that can be called "denigrating" to or complaining about the work ethic, or anything else, about fellow employees.

Similarly, Charles Terrizzi's assertions at trial that in his interview Criley kept returning to and repeatedly raising the same issue or complaints—"grinding on"—even after he and Jan

Terrizzi told him, we've already discussed this, move on, is not reflected in any way in Jan Terrizzi's notes of the interview. <sup>17</sup>

Finally, the claim that Erkens said "I don't think I should have to work more than 8 hours" is not in Jan Terrizzi's notes. What is in her notes, is the statement, exactly as Erkens testified he might have said it, that he "would prefer 8 hrs. vs. 10 hrs." There is nothing in Jan Terrizzi's notes corroborating the Terrizzis' claim that the "soft spoken" and "polite" Erkens projected "a feeling of being very angry towards the company," as she claimed in her testimony. There is nothing in the notes corroborating the assertions that Erkens was angry with fellow employees.

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As discussed above, Jan Terrizzi explained that her interview notes—and notetaking generally—represented an important exercise for her. They were intended to function as a substitute for memory—"That's how I deal with my life, I take notes. I don't have a good memory. So I take notes." Accordingly, it is fair to assume that Jan Terrizzi wrote in her notes items she felt were important, that she wanted to remember. I recognize that Terrizzi testified that her notes left out a lot, even items she thought important, and rather than a verbatim account were "my way of understanding" and "my trying to get a feeling for who people are." Yet, the notes are an account of comments and statements made at the interview, and subjects covered. Based on her testimony, it is clear to me that the notes were not casually taken. Many of the statements admittedly made by employees are in the notes. None of the disputed ones may be found in the notes. It is an added factor, in addition to demeanor and other matters discussed above, that weigh in favor of the employees' credibility and against the Terrizzis.

In sum, there is nothing in Terrizzi's interview notes corroborating the Terrizzis' assertions—all of which were pointedly disputed by the employees—about negative (in some cases very extreme) statements and actions by Stewart, Erkens, and Criley. I credit Stewart, Erkens, and Criley, and find that these comments were not made as attributed to them by one or both of the Terrizzis.

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Analysis

A. Wright Line Provides the Appropriate Analytical Framework

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Section 8(a)(3) of the Act provides, in relevant part, that it is "an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Under Section 8(a)(3), the prohibition on encouraging or discouraging "membership in any labor organization" has long been held to include, more generally, encouraging or discouraging participation in union activities. *Radio Officers v. NLRB*, 347 U.S. 17, 39–40

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<sup>&</sup>lt;sup>17</sup>Nor did Charles Terrizzi's pretrial affidavit account of the Criley interview contain any mention of Criley repeating himself, returning to issues and concerns he had raised, or any type of "grinding on issues," which Terrizzi pointed to in his trial testimony as a key concern that motivated the decision not to hire Criley. I reject the suggestion in Terrizzi's testimony that the affidavit was somehow flawed because he was forced to talk to the Board agent taking the affidavit based solely on his memory or because she allegedly "picked and cho[se] what she chose to write down out of the interview." Terrizzi was represented by counsel who was present during the affidavit process, and Terrizzi (presumably aided by counsel) made changes to the draft affidavit prepared by the Board agent before signing it.

(1954). The discharge of an employee or the refusal to hire an employee applicant that is motivated by antiunion animus is archetypal unlawful discrimination under Section 8(a)(3).<sup>18</sup>

The Supreme Court-approved analysis in cases turning on employer motivation was established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (approving *Wright Line* analysis). In *Wright Line*, the Board determined that the General Counsel carries the burden of persuading by a preponderance of the evidence that employee protected conduct was a motivating factor (in whole or in part) for the employer's adverse employment action.

In *Planned Building Services*, 347 NLRB 670 (2006), the Board held that *Wright Line* provides the appropriate framework for deciding whether a successor employer violated Section 8(a)(3) by refusing to hire predecessor employees. This includes cases, such as this one, where most of the predecessor employees were hired, but the General Counsel alleges that the new employer unlawfully discriminated by refusing to hire certain employees. *TCB Systems, Inc.*, 355 NLRB No. 162 (2010).

"To establish a violation of Section 8(a)(3) under *Wright Line* where a refusal to hire is alleged in the successorship context, the General Counsel has the burden of showing that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. Once the General Counsel has made this showing, the burden shifts to the employer to demonstrate that it would not have hired the predecessor's employees even in the absence of its unlawful motive." *Downtown Hartford YMCA*, 349 NLRB 960 (2007).

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The General Counsel's proof of unlawful motivation for the refusal to hire can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004), enfd. 184 Fed. Appx. 476 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

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Of significance here, "a pretextual explanation of the employer's action will support an inference of discriminatory motivation." *Kentucky River Medical Center*, 355 NLRB No. 129, slip op. at 3–4 (2010); *All Pro Vending*, 350 NLRB 503, 508 (2007); *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004), citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) ("When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal—an unlawful motive.") (internal quotation omitted); *Whitesville Mill Service, Co*, 307 NLRB 937 (1992) ("we infer from the pretextual nature of the reasons for the discharge advanced by the Respondent that the Respondent was motivated by union hostility"), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Indeed, even something short of a pretext: merely the failure to "substantiate [an] asserted rationale for not hiring [alleged discriminatees], coupled with evidence undercutting th[e] rationale," will support a finding of unlawful motivation. *TCB Systems, Inc.*, supra, slip op. at 3 (2010).

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<sup>&</sup>lt;sup>18</sup>As any conduct found to be a violation of Section 8(a)(3) would also discourage employees' Section 7 rights, any violation of Section 8(a)(3) is also a derivative violation of Section 8(a)(1). *Chinese Daily News*, 346 NLRB 906, 934 (2006), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007).

Notably where "'the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Rood Trucking*, 342 NLRB at 898, quoting Golden *State Foods Corp.*, 340 NLRB 382, 385 (2003).

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# B. Application of Wright Line in this Case

In a Wright Line case, the General Counsel's initial burden is to establish that antiunion animus was a motive for the adverse employment action. "The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer." Kentucky River Medical Center, 355 NLRB No. 129, slip op. at 2, fn. 5 (2010).

In this case, each of the alleged discriminatee's interviews resulted in the disclosure to the Respondent of the employee's prounion support and sentiments.

Stewart's union activity, of course, was made known to the Terrizzis early in the interview. He identified himself as the plant union representative, known to the Terrizzis as Pudge, and discussed at length the Terrizzis plans for the facility. Both he and the Terrizzis talked about how various items would be a subject of negotiations. Stewart offered (and the Terrizzis agreed) to provide them with a union health care plan that the Terrizzis could consider for use at the facility. Although (as the Respondent stresses) this was a job interview, not a negotiating session, Stewart's status as union representative was fully on display.

In his interview, Erkens offered explicit support for continued union representation at the workplace. Erkens directly asked the Terrizzis how they felt about having a union at the facility. The Terrizzis told him, "we understand that there is a union in place here" and added that they had no problems with a union "as long as there is no trouble or conflict." The Terrizzis then asked Erkens what he thought about the Union. Erkens told them he believed "we should probably have a union in here" because some in management were not open to discussion or willing to listen to employees. Thus, the interview established Erkens as a supporter of having a union in place at the facility (because of his concerns about management), and as someone willing to raise the subject with the Terrizzis.

Finally, it is clear that the Respondent believed Criley to be a union supporter. Although she could not recall it at trial, Jan Terrizzi admitted (in her pretrial affidavit) that Criley seemed "very pro-union." In other words, the Respondent believed Criley to be "very pro-union." It is unlawful for an employer to act against an employee based on such belief.<sup>19</sup>

The third prong of *Wright Line* is the showing that antiunion animus was a motivating factor for the decision not to hire the employees in question. The Respondent denies it and says it played no role in its decisions.

I believe the evidence supports the conclusion that antiunion animus played a role in the decision, in each case, not to hire the discriminatees.

<sup>&</sup>lt;sup>19</sup>See *Koronis Parts Inc.*, 324 NLRB 675, 698 (1997) ("Of course, suspicion or belief that an employee is a union sympathizer is as unlawful a motivation as actual knowledge that she supports a union").

I recognize, as the Respondent stresses in its brief, and as it stressed at trial, that the Employer did not evince hostility to union representation per se. It purchased the facility intending to hire the bargaining unit employees and intending to recognize the Union. It did, in fact, hire most of the bargaining unit employees, and did, in fact, recognize the Union. Given this, the Respondent contends that the idea that the Respondent's actions could be motivated by antiunion animus is without force.

But just as an employer may lawfully be opposed to unionization and not be guilty of unlawful discrimination or interference with employee rights, an employer that is willing to recognize, bargain, and accept union representation may act to abridge union rights and may be guilty of unlawful discrimination.

Indeed, notwithstanding the reliance that the Respondent places on Wismarq's voluntary recognition of the Union, given its desire to take advantage of the experienced NAPCO workforce, 20 not recognizing the Union was not an option, and Charles Terrizzi knew this. 21 At the same time, it is undeniable, as the General Counsel and Union stress, that having the right "kind" of union and union-management relationship was of great importance to the Terrizzis and was on their mind as they purchased the facility and hired the workforce.

The Terrizzis stressed the importance of the "good relationship" they had heard existed between the Union and NAPCO to their decision to acquire the facility. Charles Terrizzi readily and vividly conveyed at trial the difficulties with the union at its original facility, which left the Terrizzis "appalled" and with "a bad taste . . . in our mouth." The experience included "coercive" union tactics, and outrageous bargaining demands, and the view that to the union at that facility, the employees were their "slaves" and "puppets." As referenced above, Terrizzi testified that he would not "consider buying a company" that had union trouble, and as he explained to Erkens, "we don't have any problems with the Union as long as there is no trouble or conflict."

This is important context. Because of their past experiences, union conflict or trouble was a big concern for the Terrizzis. And despite the assurances from Ply Gem of the good relationship with Union, the interviews revealed that employees had significant "underlying concerns or issues" about their employment conditions. As Charles Terrizzi testified, through the interviews, "we got all of that and more."

The Terrizzis' willingness to recognize the Union does not equate to indifference to the Union, or to the type of Union at the facility. To the contrary, due to their past experiences they wanted, indeed, were set on, and one might even venture, somewhat unrealistically, a union with "no issues." They were on heightened lookout for any type of labor "trouble."

<sup>20</sup>Charles Terrizzi testified that "[w]e did not necessarily want to buy a facility where there wasn't [a] good qualified work force, because it would be very expensive to hire and train people who weren't experienced. So we were very pleased to find out that the work force there was experienced and competent."

<sup>21</sup>As Charles Terrizzi remarked in regards to the obligation to recognize the union, "we knew what the law was and we didn't have a problem with it."

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The Terrizzis' particular and articulated concern with the having a union they were comfortable with is relevant to the issue of the hiring of employees. Particularly in a small facility such as this one, the relationship between the union and the employer will very much be influenced, if not determined, by the individual employees hired by the employer. The Terrizzis believed this. They were open at the hearing that "[w]hat we were looking for was a cohesive work force. We wanted people of good character. We wanted people who were willing to be flexible, who were cooperative and would fit in with work as team players and not cause friction." It is, I believe, quite a stretch, given the Terrizzis' very openly discussed concern about having a "trouble"-free and "conflict"-free union, to contend that an employee with prounion sentiments that portended labor-management "trouble" or "conflict" could fit this criteria of a "flexible" "cooperative" "team player" who would not cause "friction."

With this background in mind, in terms of the General Counsel's initial case that antiunion animus contributed to the decision not to hire the discriminatees, it is useful to look at the role that Union issues played in the hiring.

Out of 23 employees, only two were identified as holding significant union positions at the facility at the time of the interviews. Stewart was the chair. Donop the griever. It would be one thing to point only to the failure to hire Stewart and conclude that discrimination against him is evidenced by the mere fact that of the three employees out of 23 not hired one was a union agent. But the record also demonstrates that after the interviews the Terrizzis were planning *not* to hire Donop, the other union agent, as well. As he did with Stewart, Criley and Erkens, Charles Terrizzi pointed to his detection of "underlying anger issues" to explain his reluctance to hire Donop.

This means that the Terrizzis' plan was, out of a workforce of 23, to hire neither of the two union representatives, but 19 of the remaining 21. Of course, Donop was hired, but only because Ferrese intervened in support of Donop and convinced the Terrizzis to hire him. I do not believe that Ferrese's intervention obviates the appropriateness of noting that the Terrizzis' interviewing system produced results that would have led to 82 percent of the bargaining unit being hired while 0 percent of the incumbent union representatives were slated for hire. The two incumbent union representatives constituted 9 percent of the bargaining unit, but 50 percent of those who were to be rejected for hire.

This is entirely disproportionate. The grossly disproportionate refusal to hire local union officials is evidence in support of the General Counsel's affirmative case that discrimination played some role in the failure to hire Stewart. *Holding Co.*, 231 NLRB 383, 390 (1977) (disproportionate number of union adherents discharged is evidence of discrimination). *American Wire Products*, 313 NLRB 989, 994 (1994) ("As pointed out by the General Counsel, the Board and the courts have long held that, absent a reasonable explanation, the disproportion between the number of union and nonunion employees laid off or discharged may be persuasive evidence of discrimination") (and cases cited therein); *Baker Mfg. Co.*, 269 NLRB 794, 816 (1984) ("Such a lopsided percentage favoring layoff/ termination of only union

<sup>&</sup>lt;sup>22</sup>On brief (R.Br. at 13, fn. 5), the Respondent suggests that the Terrizzis' attitude toward the Union is a trivial matter, as "[c]learly, no employer wants to have a union relationship with trouble and conflict." But there is more significance than that. Here, the Terrizzis made plain to employees in interviews, and at the hearing, the importance to them of there being no conflicts and indeed, that their willingness to purchase facility hinged on it.

supporters is indicative of an unlawful motivation and has been so recognized by the Board and the courts"), enfd. in relevant part 759 F.2d 1219 (5th Cir. 1985).<sup>23</sup>

Another factor, apart from statistics, that must be considered is the role that union issues and sentiments appeared to play in the interviews. Jan Terrizzi testified that she is a practiced notetaker, relying on them to compensate for weakness in her memory. Given this, the notes cannot but help but take on some weight in understanding what occurred in the interviews. While Terrizzi denied that the notes were verbatim, neither were they casually taken. Notes are Terrizzi's "life." Her interview notes record the following in reference to unions:

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# Notes of interview with Blaine Gilchrist:

"would prefer not to be in the union."

#### Notes of interview with Dan Steere:

(initial note): "Was wearing a steelworkers T-shirt" (concluding note): "Says he thought of wearing his non-union T-shirt."

# Notes of interview with Tim Barkley:

"non union?!"

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#### Notes of interview with Erkens:

"doesn't feel upper management listens -- + that's why there is a union"

Thus, there are references to unions in four of the interview notes. The employee that evinced support for the Union (Erkens) was not hired. With Steere, Terrizzi noted that he wore a union shirt to the interview. For whatever reason (Jan Terrizzi shed little to no light on this), Steere made a point, and Jan Terrizzi made a point of writing it down, that "he thought of wearing his non-union" shirt. It reads as if the attention brought by wearing the union shirt was defused with what appears to be a disavowal of the union sentiments expressed by his shirt. Steere was hired. Gilchrist told Terrizzi, and she noted, that he "would prefer not be in the union." He was hired. As to Barkley, Terrizzi wrote "non union" adding a question mark (because the employees were, of course, union-represented) and an exclamation point, which appears to reflect Terrizzi's excitement at the prospect. Based on her notes, I do not believe Jan Terrizzi's claim that "union considerations were the further[st] thing from [her] mind when [she was] going through the process of deciding whether to hire somebody."

I would add that the Terrizzis effort to explain these notes was not helpful to their cause. Jan Terrizzi testified that Erkens' comment that he "doesn't feel upper management listens" was a reason he was not hired, but asserted that the rest of the comment she wrote down—i.e., "that's why there is a union" had no bearing on the hiring decision. She testified that "it wouldn't surprise me at all" if her reference to Steere's union shirt was the only reference in all of her notes to the clothing worn by employees. In fact, the parties stipulated it was the only such reference. Terrizzi's explanation for writing down the statement that Gilchrist "would prefer not to be in a union" was that she wrote it down because he "made that statement." But Jan Terrizzi was also adamant that she did not write down everything the employees said. She offered no

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<sup>&</sup>lt;sup>23</sup>Further, as discussed below, the fact that the hiring (or nonhiring) decisions were the product of an entirely subjective process with entirely subjective criteria, raises credibility concerns about the Respondent's explanation for its decisions. It also heightens the inference of discrimination found in the disproportionate hiring patterns documented above. See *Huck Store Fixture Co.*, 334 NLRB 119, 121–122 (2001), enfd. 327 F.3d 528 (7th Cir. 2003).

explanation as to the context of what prompted Gilchrist's statement that he "would prefer not to be in a union" or why she chose to make note of it. Finally, Jan Terrizzi testified that she had "no idea" why she wrote down the word "non union" with a question mark and an exclamation point during Barkley's interview. Charles Terrizzi offered an explanation for it, but I find his explanation to be obviously disingenuous. Given all the evidence and the explanation provided by Charles Terrizzi, I believe the exclamation mark can be reasonably read as reflecting excitement on Jan Terrizzi's part that the employee had expressed nonunion sentiments. <sup>24</sup>

In sum, the notes with their limited but significant references to the Union, combined with actual hiring patterns, stand as further evidence that antiunion animus played some role in the hiring process.

The foregoing would be sufficient to satisfy the General Counsel's initial "prima facie" *Wright Line* burden, but there is more to consider.

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As to Stewart individually, it is significant in considering the General Counsel's case that Stewart spoke to the Terrizzis' as a union representative, as well as an individual seeking employment. Realistically, there is no compartmentalizing the discussion. It is true that the purpose of the interview was to consider Stewart for individual hire. The meeting was not called as a labor-management meeting. But that does not negate the fact that Stewart, who identified himself as the union's chief agent at the facility, and the Terrizzis, talked with each other about

<sup>24</sup>Charles Terrizzi explained Jan Terrizzi's "non union" note on Barkley this way:

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Mr. Barkley told us that in the last negotiations of the contract that the maintenance employees were basically excluded from—and it was unclear to us exactly what he meant—but best I can recall his words were that they had somehow gotten pushed aside during the negotiation.

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That whatever moneys were available for increases in wages are going to be given to the other people and that the maintenance guys were on their own. Which surprised us. That's why I believe that Mrs. Terrizzi made the note.

[Barkley] was an electrician. He basically referred to them as, himself as not being in the Union, or nonunion because he hadn't been represented during those negotiations.

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Which, again, confused us a bit because it was our understanding that all of the hourly work force was represented by the Union.

But he told us basically he was not. So that's what the tone was.

It was a, I believe, was a note that she was saying, hey, we better check on this. Are they included or aren't they included?

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I listened to this attempt to explain away Jan Terrizzi's note and do not believe it. Indeed, the fact that I am supposed to believe it is troubling. Barkley may, in fact, have taken the opportunity of the interview to complain about his union representation. It is interesting that he felt comfortable to do so, but he did not testify and I attribute nothing to that. But by his own testimony, Terrizzi has extensive experience, vividly described and of obvious import to him, in dealing with unions that, in his view, poorly represent employees, and that were ultimately rejected by the employees they represented. Not for a minute do I believe this "confused" the Terrizzis' or prompted them to need to "check on" whether the maintenance employees were represented. Rather, the note indicated an exclaiming reaction to an employee dissatisfied with his union representation.

numerous issues, which both Stewart and the Terrizzis identified as issues that would be the subject of negotiations. Stewart raised question, made suggestions, and voiced opinions on seniority, vacation calculations, health care, and, of great importance to the Terrizzis, "argued" (according to Charles Terrizzi) about the Union's agreement with NAPCO on employees working multiple jobs.

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This interview with Stewart has to be placed in the context of an employer that stated that thought "the Union had no issues [with] either NAPCO or Ply Gem" and "if there [were] . . . he wouldn't have bought the place." This interview has to be placed in the context of an employer, who told an employee that "our other two plants aren't Union . . . . And we don't have any problems with the Union as long as there is no trouble or conflict." This interview has to be placed in the context of an employer looking for employees "who were willing to be flexible, who were cooperative and would fit in with work as team players and not cause friction." The inference that Stewart—who presented himself as and raised numerous issues as a union representative—did not meet the Terrizzis' criteria of "flexible" and "cooperative" and not causing "friction"—at least in part—because of his extensive discussion of and attitude toward "negotiating" issues, is warranted.<sup>25</sup>

In his interview, Erkens identified himself as a union supporter, after being directly asked his views on the subject by (one of) the Terrizzis. While the General Counsel does not allege that the questioning was independently unlawful (and I do not so find), this questioning supports the inference that antiunion animus was a motivating factor in the failure to hire Erkens. The Board has found that an employer's questioning of an applicant's union preferences during the application process is inherently coercive and unlawful. *Brandeis Machinery*, 342 NLRB 530, 533–534 (2004), enfd. 412 F.3d 822 (7th Cir. 2005); *Lackawanna Electrical Construction*, 337 NLRB 458, 464 (2002).<sup>26</sup>

<sup>&</sup>lt;sup>25</sup>The Respondent contends that Stewart's "flexibility" problem related only to his personal preference for not working jobs on the paint line, but not to his "arguing" with the Terrizzis, on behalf of the Union, whether to continue the downsizing agreement between the Union and the new employer. Stewart expressed the view in the interview that with the flexibility arrangement in place Ferrese had the freedom to shift employees among the paint line jobs and leave him free to run the forklift. In his testimony, Ferrese corroborated what Stewart essentially admitted: that even while Stewart negotiated the multitraining provision between the Union and NAPCO, and maintained excellent relationships with management, he found it difficult to qualify on some new jobs, and preferred to remain on his incumbent positions. Stewart did, however, comply with the agreement under NAPCO, was qualified on many jobs, and there is not a hint in Ferrese's testimony that Stewart ever refused to comply with directives. Stripped of the extreme statements attributed to him by the Terrizzis, but discredited, above, Stewart's preference for one set of jobs over another is not very remarkable—no more remarkable than the remark captured in the interview notes of employee Walker that he would prefer to work on the roll forms than the paint line. Walker was hired. I do not believe Stewart was not hired because he expressed a personal preference for staying on his old job and for not taking advantage of the multitask agreement to earn pay for learning new jobs.

<sup>&</sup>lt;sup>26</sup>I recognize that the conversation about the Union was initiated by Erkens, who asked the Terrizzi's their view of the Union. That said, a potential employee's questioning of the potential employer about its views on unions cannot be equated with or license a potential employer's questioning of an applicant about unions. It seems to me that a hiring interview involving an applicant, the president of the new employer, and the CEO of the new employer, is as coercive a circumstance as exists to question an applicant about his union sentiments.

Moreover, the relationship between the statement Jan Terrizzi admitted (Tr. 46–47, 69) was a reason Erkens was not hired—i.e., the statement that Erkens "doesn't feel upper management listens"—and Erkens' assertion that there should be a union at the facility, is so close as to call into question the distinction between the statements that the Respondent would draw. They were, in fact, one statement. Even in Jan Terrizzi's telling of it (Tr. 47), and in her notes, the reason Erkens said a union was needed was precisely *because* upper management doesn't listen. She says he wasn't hired, in part, because of the former, but not the latter. The parsing is farfetched and not credible.<sup>27</sup>

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Finally, Criley, identified by Jan Terrizzi, as "very pro-union," was not hired by the Respondent. I think the inference must be drawn that this view of Criley played a role in the hiring decision. It is not expressly established in the record why Criley was regarded as very prounion. It was, however, necessarily due to his performance at his interview (that was the Terrizzis only contact with him), which the Terrizzis complained about bitterly. Given the Terrizzis' demonstrated preference for employees with antiunion preferences, their demonstrated problems with union adherents such as Stewart and Erkens, their aversion to union "conflict" or "trouble," their multiple complaints about Criley, and the number of issues he raised about workplace terms and conditions in his interview—which prompted Charles Terrizzi to exclaim in the interview, "we're not coming in here with bags of money"—I think the inference must be drawn that Criley's complaints about numerous work, benefit, and safety issues were what contributed to him being regarded as prounion, and thus, to the refusal to hire him.<sup>28</sup>

The above factors lead me to conclude that the General Counsel has met his burden of establishing that antiunion animus played some role in the failure to hire the three alleged discriminatees. But an examination of the Respondent's explanation for failing to hire the three adds significantly to the General Counsel's case.

In their account of the hiring decisions the Terrizzis disavowed any intent to discriminate based on union sentiments. Jan Terrizzi attributed the failure to hire the employees to the demeanor of the employees,<sup>29</sup> but also to the concerns expressed by employees about terms

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<sup>&</sup>lt;sup>27</sup>Jan Terrizzi subsequently agreed (Tr. 98), under nonadversarial questioning by the Respondent's counsel, that Erkens' statement about upper management not listening and that's why there is a union, was of no consequence "in terms of hiring." This contradicts her earlier, repeated testimony, that Erkens' complaint about management *was* a reason he wasn't hired.

<sup>&</sup>lt;sup>28</sup>I note that the issue is not whether Criley engaged in union activity during the interview. The point is that the evidence suggests that the Terrizzis' view of Criley as "very pro-union" contributed to their decision not to hire him. *Elsa Canning Co.*, 154 NLRB 1696, 1704 fn. 21 (1965) ("It is immaterial that some of the discriminatees did not engage in union activities . . . prior to [rehiring] or that Respondent may not have had knowledge of all those who did. It is sufficient to show, as here, that the discrimination was based on Respondent's belief or suspicion that the employees . . . might be prounion adherents or sympathizers"); *Koronis Parts Inc.*, 324 NLRB 675, 698 (1997) ("Of course, suspicion or belief that an employee is a union sympathizer is as unlawful a motivation as actual knowledge that she supports a union").

<sup>&</sup>lt;sup>29</sup>Jan Terrizzi's reasons for not hiring the employees included that Stewart had a "chip on his shoulder" and gave her "just a very negative feeling." Erkens had a "poor attitude," was "a good fit" and was "very angry towards the company." Criley was not hired because he had a "really poor attitude," and appeared "insulted" that he had to talk to the Terrizzis.

and conditions of employment. (She also denied this as well.) This was contradicted by Charles Terrizzi, who denied that the substance of the employees' comments were the basis for not hiring them.<sup>30</sup> Rather, it was the way they said it. The gist of Charles Terrizzi's explanation for not hiring these applicants was his assertion that these three failed to meet hiring criteria that was grounded in their manner—particularly an "anger" he detected in them, and other highly subjective, often vague, and similar criteria wholly undisclosed to the applicants.<sup>31</sup>

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Terrizzi's attribution of negative emotional characteristics to the applicants was coupled with the forceful assertion that, as a new employer, he had the right to make these determinations. As he put It, "That's a conclusion I have a right to reach" (Tr. 260) or "[a]s an employer I have a right to establish that criteria. I did and that was my judgment." (Tr. 262.)

I have already discredited some of the extreme and disputed accounts of the employees' actions which the Terrizzis claimed formed a large part of their rationale for not hiring the

<sup>30</sup>One example. Jan Terrizzi testified (Tr. 48) that a reason Criley was not hired was his comment that he was reluctant to talk about how he felt about NAPCO management because if he said what he wanted to he would be fired. However, Charles Terrizzi testified, in reference to the same comment by Criley, that "[i]f he felt uncomfortable discussing it, we respected his right not to do that."

<sup>31</sup>Charles Terrizzi attributed the refusal to hire Stewart to the claim "he doesn't seem to want to be flexible." He gave the "general impression, that he was going to do what he was going to do, regardless of what somebody told him." Stewart was "not what we are looking for in a cooperative flexible workforce." On cross examination, Terrizzi added that another reason Stewart was not hired was because of a "certain amount of anger he showed during the course of the discussion." He exhibited an "angry manner."

Terrizzi found similar anger in Donop, the union griever he did not want to hire because Terrizzi "sensed throughout" that Donop had "some underlying anger issues." Ferrese convinced him to hire Donop.

Charles Terrizzi did not want to hire Erkens because, despite being "soft spoken, very polite, very measured," Terrizzi believed Erkens had "anger with his fellow employees" that was "underlying" his demeanor. Some of Erkens' comments had an "edge." Terrizzi testified that "he doesn't seem like he really wants to be cooperative with everybody" and "he has this anger that maybe in stressful situations, we don't know, that comes out that might cause him to be disruptive."

Terrizzi testified that Criley was not hired because of his "anger." Although he was "an interesting guy" and the [i]nterview went well," according to Terrizzi, "[t]he tipping point for me, which is what stands out, was his anger, continued anger" over events that had happened in the past. "[l]t was like he could never let go of anything. The "most telling" according to Terrizzi, was Criley's relating of an incident where he was denied time off to be with his dying mother and because of this, by the time he reached his mother she had died. Terrizzi offered that this was an "appalling" situation, but he was put off by what he described as Criley's "continu[ing] to be angry." On other issues too, Terrizzi testified that he found that Criley "held that anger." Terrizzi asserted that other employees complained, but they still had "a positive outlook" and were willing to make a "fresh beginning." By contrast, Terrizzi found Criley to be "very, very negative." Terrizzi insisted on cross-examination that his view was not based on the substance of Criley's comments. According to Terrizzi, Criley "was entitled to his point of view." Rather, the problem, according to Terrizzi, was that Criley "wasn't willing . . . to get beyond that, to look beyond the fact that there was a new company coming in and things could change if he was having some difficulties."

employees. Thus, given the credibility resolutions, I necessarily reject the suggestion that Stewart announced that he would not be told what jobs to perform, or that the agreement to perform multiple tasks was "B.S." I reject the contention that Erkens said he did not think he should have to work more than eight hours. I reject the claim that Criley repeated complaints and "ground on" with complaints in a repetitious fashion. As stated, above, I do not credit these claims.

But Charles Terrizzi exhibited what he seemed to believe to be a more canny approach to defending his hiring decisions. As he testified, he grounded his rationale in ever more subtle, subjective, unverifiable—and, therefore to his mind, I have no doubt, unchallengeable—assessments of the rejected applicants. He detected anger, attitude problems, and the potential for disruption based in these employees—even the "soft spoken" and "polite" Erkens—and identified these attributes as the basis for failing to hire them. He was, indeed, careful to distinguish those attributes—which formed the basis of the hiring decision—from the substance of the complaints about working conditions, which he claimed he invited, and which were common to many employees, and which he said did not hold against people. Terrizzi then, repeatedly, made the point that it was his "right" to judge people in this manner, and to refuse to hire them because of these judgments. And indeed it is. If it is believed. But there is a reason to be skeptical.

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An established doctrine in Title VII case law is the supposition that "informal, secretive and subjective hiring practices are suspect because they tend to facilitate the consideration of impermissible criteria." EEOC v. Metal Service Co., 892 F.2d 341, 350 (3d Cir. 1990). This same concern (albeit less vividly stated) is found in Board precedent. See Waterbury Hotel Management, LLC, 333 NLRB 482, 551 (2001) ("Having set up a system in which subjective impressions of screeners and interviewers were the basis for determining who got hired, rather than establishing objective criteria based on normal criteria such as skills and experience, work history, attendance, and similar criteria, Respondent has made it virtually impossible for it to establish a Wright Line defense"), enfd. 314 F.3d 645 (D.C. Cir. 2003); Advance Transportation Co., 299 NLRB 900 (1990) (uncorroborated conclusary assertions about why employee was terminated for declining work performance do not satisfy the Respondent's burden under Wright Line). In similar vein, the Board has repeatedly held that unwritten employment policies are ready tools for discrimination and are suspect. Planned Building Services, 347 NLRB 670, 715 (2006) (the fact that a putative policy is unwritten lends support to a finding that it is pretextual); See FES, 331 NLRB 9, 13–14 (2000) (placing burden on employer to prove applicant's failure to meet employer's specific subjective criteria for position).

Here, the Terrizzis knew—or assumed—that all the employees were qualified for their jobs in terms of skill and experience. The Terrizzis, particularly Charles Terrizzi, but also Jan Terrizzi, explain their hiring decisions based on subjective feelings and perceptions of the employees demeanor and attitudes. These "criteria" as Charles Terrizzi, referred to them were never disclosed to employees, announced, written down, or otherwise adopted. Moreover, there is no corroboration for these perceptions, or their relationship to the hiring decisions. Notably, at the time they decided not to hire the employees, the Terrizzis ran their intentions by Ferrese. They mentioned nothing to him about Stewart, Erkens, or Criley being angry, or having a propensity to be disruptive, or being arrogant. Asked what the Terrizzis told him about not wanting to hire Stewart, Criley, or Erkens, Ferrese answered vaguely: "The general was the willingness to learn different jobs and being a team player." This sounds like an extremely vague and halfhearted reiteration of some of what the Terrizzis stated at trial. But, in any event, nothing about disruption, northing about anger, nothing about negativity, nothing about not getting past complaints, nothing about refusing to be told what to do. And even the charge of preferring to not do different jobs, has no basis in regards to Erkens and Criley. Jan Terrizzi's

notes contain no reference to these (or any other) negative demeanor or negative personality traits. If these were, in fact, the basis for rejecting these employees for hire, then Jan Terrizzi would have written something—anything—in her notes that corroborated the claim. Indeed, none of the notes introduced into evidence reference this kind of subjective criteria, even as to employees who were hired, further calling into question the contention that the Terrizzis' subjective evaluation was a criteria for employment. There simply is no corroboration for the self-serving claims made by the Terrizzis about their negative subjective evaluation of the employees, much less that it motivated the hiring decisions. *Centerline Construction Co.*, 347 NLRB 322, 326 (2006) (discrediting claim that objectively qualified applicant was not hired because of lack of "enthusiasm" and failure to "sell herself" in interview, where "employment ad response log . . . used to list the skills of every applicant, contains no reference to [applicant's alleged failure to sell herself . . . . Moreover, there is no reference to any applicant's alleged ability to sell himself or herself throughout the employment ad response log"), enfd. 247 Fed. Appx. (4th Cir. 2007).

I discredit and reject the Terrizzis' conflicting, amorphous, and subjective claims for why, among all the employees, they did not hire Stewart, Erkens, and Criley. I infer that there is some other motive for the refusals to hire, but one the employer desires to conceal. Under the circumstances, I infer that it is the unlawful motive that was alleged in the trial here: the alleged unlawful discriminatory motive. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995). As noted above, "a pretextual explanation of the employer's action will support an inference of discriminatory motivation." *Kentucky River Medical Center*, supra; *All Pro Vending*, supra; *Rood Trucking Co.*, supra; *Whitesville Mill Service*, supra.

Accordingly, with regard to the failure to hire Stewart, Erkens and Criley, the government has met its *Wright Line* burden and proven that antiunion motives played a motivating role in the decision not to hire them. Given that the Respondent's account of its hiring decisions is a pretext, this "defeats any attempt by the Respondent to show that it would have discharged the discriminate[e]s absent their union activities." *Rood Trucking Co.*, supra at 898; *La Gloria Oil Gas, Co*, 337 NLRB 1120, 1124 (2002). "This is because where 'the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Rood Trucking*, supra, citing, *Golden State Foods*, 340 NLRB 382, 385 (2003).

In the most general sense, the story of this case is the story of an employer, required to recognize the Union because of its desire to rehire the experienced workforce, but intent on having a union that met its criteria for being trouble free and conflict avoidant. Faced with the prospect, apparent from the interviews, that the Union, its representative, and the employees, were less happy with working conditions than the Respondent understood when it relied on Ply Gem's promises of an excellent union-management relationship, it took unlawful action to discriminate against certain prounion employees. It took advantage of the hiring process to prune away three prounion applicants who made their sentiments clear to the Terrizzis. These three were Stewart, Erkens, and Criley. The Respondent's refusal to hire Stewart, Erkens, and Criley violated the Act as alleged.<sup>32</sup>

<sup>&</sup>lt;sup>32</sup>In view of my conclusions, I do not reach the General Counsel and Union's alternative theory that the Respondent's failure to hire Erkens and Criley was unlawful because it was intended to the cover up or lend "credence" to antiunion discrimination against Stewart. *Fast Food Merchandiser, Inc.*, 291 NLRB 897 (1988).

## Part II

# A. The Information Request

On August 2, 2010, Union Staff Representative Elmer Bloom wrote to Charles Terrizzi, and on behalf of the Union "demanded" that Wismarq recognize the Union as the newly hired bargaining unit employees. The letter also requested the following information: (1) a list of presently employed bargaining unit employees, their names, addresses, dates of hire, and job titles; (2) a detailed description of the terms and conditions of employment; and, (3) a list of former NAPCO employees who applied for employment at Wismarq but were not hired, and an explanation for the denial of employment.

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Terrizzi responded by letter dated August 20, 2010. He stated, "Let me first of all say that we don't like that in your first written communication to us you make demands." Terrizzi stated that "it certainly does not reflect in the kind of working relationship Wismarq had expected to have with the USW. And, does not reflect the kind of relationship, we have been le[d[ to believe the USW had with Ply Gem."<sup>33</sup>

Terrizzi went on to "acknowledge and recognize th[e] provision in the law" that directs that the Union becomes the bargaining agent due to Wismarq's hiring of a majority its employees out of NAPCO's union-represented bargaining unit.

Addressing the Union's request for information, Terrizzi responded as follows: (1) Wismarq provided a list of the production employees, their start dates and job titles. However, Terrizzi wrote, "[w]e decline your request for addresses because we have been given no permission, by our employees, to disclose them to you"; (2) Wismarq provided a list of general terms and conditions of employment that had been provided to the employees; and (3) Wismarq declined to provide a list of persons interviewed for positions. Terrizzi wrote: "Who we interviewed and hired or not hired is not appropriate for discussion. We conducted the interviews in accordance with all laws and made our decisions without any unlawful discrimination of any kind playing a part."

Bloom responded to Terrizzi's letter on September 2, 2010, noting that he received the letter in his office on August 30, 2010. In his September 2 letter, Bloom suggested dates for collective bargaining, including October 4, which is the day that the parties, in fact, met for the first time to bargain. Bloom also wrote that, "[t]he USW repeats its request for the address of the bargaining unit employees and information about former NAPCO employees who were not hired by Wismarq. This information is necessary for the USW in the conduct of its duties as the bargaining agent of the Valencia employees and will aid the USW['s] development of bargaining proposals." Bloom added that "with respect to the hiring information, the USW believes that Wismarq discriminated against Dennis Stewart, Ron Criley and George Erkens."

At the October 4, 2010 bargaining session, Wismarq provided the addresses of the bargaining unit employees that had been requested by the Union.

<sup>&</sup>lt;sup>33</sup>As something of a digression, I note the sensitivity in this letter on the Respondent's part—even to the Union's writing style—when it believes the Union is not showing sufficient cooperation. This is quite consistent with the attitude it displayed toward the prospect of union representation generally, as discussed with regard to the 8(a)(3) allegations.

At the hearing, Charles Terrizzi explained that, based on the Union's representation of the workforce at NAPCO, and collection of dues, he assumed—although he admitted he had no direct knowledge of it—that the Union already had the bargaining unit addresses.

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# **Analysis**

The General Counsel alleges that the Respondent's delay in furnishing the Union with the addresses of bargaining unit employees, requested August 2, but not provided until October 4, violated the Act.<sup>34</sup>

As explained in A-1 Door & Building Solutions, 356 NLRB No. 76, slip op. at 2 (2011):

An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956) [parallel citations omitted]. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act." *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

"An unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Monmouth Care Center*, 354 NLRB No. 2 (2009) (citations omitted), reaffirmed and incorporated by reference, 356 NLRB No. 29 (2010).<sup>35</sup>

The Respondent does not contest the General Counsel's assertion that a union's request for the addresses of bargaining unit sought presumptively relevant information. *Superior Protection Inc.*, 341 NLRB 267, 269 (2004) ("it is well established that information concerning unit employees' names, addresses, phone numbers, work assignments, and hours is presumptively relevant for purposes of collective bargaining and must be furnished on request") (and cases cited therein), enfd. 105 Fed. Appx. 561 (5th Cir. 2004); *Jolie Belts Co.*, 265 NLRB 1130, 1136–1137 (1982).

Nor was the Respondent able to rebut the presumption. Its stated reason in its August 20 letter for refusing to provide the information was because "we have been given no permission, by our employees, to disclose them to you." Additionally, at the hearing, Terrizzi

<sup>45</sup> and the General Counsel does not assert that the failure to provide the Union with the requested information relating to its hiring decisions is a violation of the Act. I do not consider the issue.

<sup>&</sup>lt;sup>35</sup>In addition, an employer's violation of Section 8(a)(5) of the Act is a derivative violation of Section 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

testified that he assumed the Union already had the addresses, based on its representation of the same employees at NAPCO.

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Essentially identical defenses were squarely rejected by the Board in *Illinois-American Water Co.*, 296 NLRB 715, 724–725 (1989) (rejecting contention that information, including addresses of unit employees, did not need to be supplied to union because of the employer's concerns for employees' privacy or because employer felt the information was in possession of union or available through union stewards or union records). See also *Kroger Co.*, 226 NLRB 512, 513–514 (1976) ("Absent special circumstances, a union's right to information is not defeated merely because the union may acquire the needed information through an independent course of investigation. The union is under no obligation to utilize a burdensome procedure of obtaining desired information where the employer may have such information available in a more convenient form. The union is entitled to an accurate and authoritative statement of facts which only the employer is in a position to make. It is thus clear that where a request for relevant information adequately informs the employer of the data needed, the employer either must supply such information or adequately set forth the reasons why it is unable to comply").<sup>36</sup>

The Respondent corrected its mistake, and by October 4, the date of the first bargaining session, provided the information. Thus, measuring from the August 2 request date, the Respondent delayed providing this information for approximately 2 months.

Was this an unwarranted delay? "[I]t is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). "In evaluating the promptness of the employer's response, 'the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information." *Allegheny Power*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)), enfd. in relevant part 394 F.3d 233 (4th Cir. 2005).

In this case, it is clear that the Respondent did not respond as promptly as possible. The information in question—the addresses of 23 employees—was readily available to the employer and could have been culled from the employees' applications, or other documents on file, within a few hours, and provided in a matter of days not weeks. The Respondent made a decision *not* to provide the requested information, although it later reversed that decision.

The Respondent argues that any violation was de minimis, and the allegation should be dismissed on that basis. I would not want overstate the impact of this violation to the Union's bargaining position. I do not doubt that the Union was able through word of mouth, or otherwise, to reach out to 23 employees, members of a largely intact bargaining unit, and obtain whatever information was needed to communicate with the employees prior to the commencement of bargaining. But part of the promise of collective bargaining is that a union is

<sup>&</sup>lt;sup>36</sup>I note that I do not read the Respondent's refusal to provide the addresses based on the failure of employees to provide permission as an assertion that the addresses are confidential. In any event, the Respondent would bear the burden of proving any such assertions, and it has not. Moreover, such an assertion would not justify Wismarq's flat refusal to provide the information. Rather, "a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation." *A–1 Door & Building Solutions*, supra, slip op at 3, citing *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991).

not required to go around the employer to obtain this kind of information. The settled precedent permits a union the convenience and right to obtain this information simply and easily, upon request, from the employer. That did not happen here, and the principle at stake is sufficient that I cannot call the violation de minimis. I find that by delaying the furnishing to the Union of the requested addresses of the bargaining unit employees, the Respondent violated Section 8(a)(1) and (5) of the Act.

#### **CONCLUSIONS OF LAW**

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1. Respondent Wismarq Valencia, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7), of the Act.

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2. Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

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3. The Union represents a bargaining unit of employees of the Respondent Wismarq Valencia that constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

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4. Since on or about August 1, 2010, the Respondent has violated Section 8(a)(1) and (3) of the Act by discriminating against employee-applicants Dennis Stewart, George Erkens, and Ronald Criley, by refusing to hire them because of their activities or support for the Union and to discourage other employees from engaging in this and other protected activity.

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5. The Respondent violated Section 8(a)(1) and (5) of the Act by delaying the furnishing of information requested by the Union and relevant to the Union's representational duties, specifically the addresses of bargaining unit employees, from August 2 to October 4, 2010.

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6. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

# Remedy

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Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Dennis Stewart, George Erkens, and Ronald Criley, the Respondent shall offer them instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed absent the discrimination against them. The Respondent shall make these individuals whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent shall remove from its files any reference to the unlawful refusal to hire Stewart, Erkens, and Criley, and, within three days thereafter, notify each of them in writing that this has been done and that the refusals to hire will not be used against them in any way.

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The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

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The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended  $^{\rm 37}$ 

#### ORDER

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The Respondent Wismarq Valencia, LLC, Valencia, Pennsylvania, its officers, agents, successors, and assigns, shall

Cease and desist from:

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(a) Refusing to hire employees because of their activities or support for the Union.

(b) Failing to timely provide the Union with requested and relevant information.

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(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

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(a) Within 14 days from the date of this Order, offer Dennis Stewart, George Erkens, and Ronald Criley, instatement to the positions for which they applied or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed had they been hired on August 1, 2010.

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<sup>&</sup>lt;sup>37</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

	( )	earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.
5	(c)	Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to hire Dennis Stewart, George Erkens, and Ronald Criley, and, within 3 days thereafter, notify these employees in writing that this has been done and that the unlawful refusals to hire will not be used against them in any way.
10 15	(d)	Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
20	(e)	Within 14 days after service by the Region, post at its Valencia, Pennsylvania facility, copies of the attached notice marked "Appendix." <sup>38</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to
25		physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event
30		that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 2010.
35	(f)	Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.
40	Dated, Was	shington, D.C. April 26, 2011
45		David I. Goldman U.S. Administrative Law Judge

Make Dennis Stewart, George Erkens, and Ronald Criley whole for any loss of

(b)

<sup>&</sup>lt;sup>38</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## **APPENDIX**

## NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT refuse to hire you because of your activities or support for the Union.

WE WILL NOT delay furnishing to the Union requested and relevant information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's order, offer Dennis Stewart, George Erkens, and Ronald Criley, instatement to the positions for which they applied or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make Dennis Stewart, George Erkens, and Ronald Criley, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire Dennis Stewart, George Erkens, and Ronald Criley, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the refusals to hire will not be used against them in any way.

		Wismarq Valencia, LLC			
		(Employer)			
Dated _	Ву				
		(Representative)	(Title)		

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under

the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="www.nlrb.gov">www.nlrb.gov</a>.

1000 Liberty Avenue, Federal Building, Room 904, Pittsburgh, PA 15222-4111

(412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

# THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 395-6899.